

A
R E V I E W
OF THE
P R I N C I P L E S
OF THE

*Enquiry concerning the Operations of the
annulling Clauses in the MARRIAGE ACT;
&c. and of the DISSERTATION on the
Power of States, &c.*

[Price ONE SHILLING.]

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R E V I E W
of
P R I N C I P L E S

of the
Theory of the
Magnetic Force
and of the
Force of the
Magnetic Field

[The End of the World]

518. P. 12.
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R E V I E W
O F T H E
P R I N C I P L E S
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Enquiry concerning the Operations of the
annulling Clauses in the MARRIAGE ACT,
&c. and of the DISSERTATION *on the*
Power of States, &c.

B E I N G
R E M A R K S

Upon a Book, entitled, OBSERVATIONS *on those Pieces.*

In which also

The OBJECTIONS of some other Writers
are considered.

By HENRY STEBBING, D. D.
Chancellor of the Diocese of SARUM; and
Chaplain in Ordinary to his MAJESTY.

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REVIEW
OF THE
PRINCIPLES

OF THE
CONSTITUTION OF THE
CHURCH OF ENGLAND

BY
H. E. M. A. R. K. S.

OF THE
THEOLOGICAL
SCHOOL OF
THE UNIVERSITY OF
CAMBRIDGE

BY
HENRY STUBBS
CHANCELLOR OF THE DIOCESE OF SALISBURY; and
CAPTAIN IN ORDINARY TO HIS MAJESTY.

LONDON:
Printed for C. Davis, against Gray's Inn,
Hobart, 1835.

P R E F A C E.

*W*HEN I published my Enquiry and Dissertation upon the Marriage Act, it was not my Intention to hold up a Controversy: nor is it my Intention now. But as several Writers have appeared against these Pieces, it may seem, perhaps, a want of Respect, if I pass them absolutely without Notice.

The first Pamphlet that was published, (entitled Observations, &c.) has these Advantages over all the rest, that
it

ii P R E F A C E.

it is concise and pertinent ; and as it comprehends every material Part of the Question, I have taken it (as it were) for my Text ; digested it into a proper Number of Sections ; and, in my Remarks under each Observation, the Reader will find (with very little Trouble) how the Merits of the Cause lies between Us. In these Remarks (or in the marginal Notes) I have taken in what I have found that is material in the other Writers ; which, I confess, has not much encreased the Bulk of this Work.

The Subject has now received all the Perfection that I am able to give it: And here I take my Leave of it.

If

P R E F A C E. iii

If there are Any who can offer what is better, I am always open to Conviction:

But as to writing any more, I must excuse myself: For an old Friend (to whom perhaps I should have attended sooner) pulls me by the Sleeve, and whispers Me

Solve SENESCENTEM maturè sanus equum, ne
Peccet ad extremum ridendus, et ilia ducat.

HOR.

R E-

THE R. E. A. C. E. P.

It is the duty of every citizen to
know the laws of his country
and to obey them. It is the
duty of every citizen to
know the rights of his country
and to defend them. It is the
duty of every citizen to
know the history of his country
and to be proud of it.

THE R. E. A. C. E. P.

R. E.

REMARKS

ON

OBSERVATIONS, &c.

OBSERVATION I.

LET it be granted, that the Child cannot make a Cession of this Right [i. e. his Right to contract Marriage] into the Hands of the Society; yet, what hinders but it may be suspended for a Time? I know no Right that may not be suspended under Society. The Law supposes the Right of contracting Marriage to lie in the Child—it only restrains the Use and Exercise of this Right, for the Benefit of the Child, p. 3, 4. —Again, p. 5. The Law neither does nor can settle the Commencement of the Right of contracting [Marriage.] But it may and

B does

does settle the Time when a Minor shall come to the free Use of this Right.

REMARKS.

The Author's Distinction between *Right* and the *Use* of Right has no Business here: For my Argument lays Claim to *both*. This appears from the very Passage which he hath cited from the *Enquiry*: where the Right pleaded for is a Right in every Man "to contract Marriage, as shall seem to him most convenient FOR THE SECURITY OF HIS VIRTUE." What is it that *secures* Virtue? Is it simply a *Right* to marry, or is it the *Use* of that Right? Let it be remembered then, that whenever I say a Person has a Right to marry, or to contract Marriage, I always mean that he has a Right to the Use of the Marriage-bed: And when the Author has disproved this Claim, with respect to Minors, I shall own myself vanquished. But I must except against his general Assertion, that there is *NO Right that may not be suspended under Society* as not (absolutely) true. It should have been laid down with this Reserve or Temperament, UNLESS the Law of
God

God directs the Use of it ; in which Case it it must never be said, that the Right is suspended for the Person's BENEFIT.—The Author proceeds.

OBSERVATION II.

The Right then being admitted with this Restriction, let us suppose a Marriage Contract made in pursuance of this Right, and the Question to be, Whether this Marriage may be dissolved by human Laws ? I answer, Yes ; for the same Reason that a Contract made by a Minor to pay a Sum of Money after he comes of Age is void in Law. If a Minor executes a Bond, he is no Knave though he does not pay the Money. His Conscience in this Case will not bind him, p. 5.

REMARKS.

What the RESTRICTION is, which the Author here speaks of, you have seen. It is, that though the Law cannot *take away* the Minor's Right, yet it can *suspend* the Use of that Right ; and with this Distinction he desires the Minor's Right may be admit-

ted: i. e. He desires it may be admitted, that in consequence of an Act of State, declaring a Nullity, the Minor is dispossessed of his Right to the *Use* of Marriage: But I beg his Pardon. This neither *is* admitted, nor *shall* be admitted, till it is *proved*; which is not yet done, unless the Author's bare *Affertion* is to pass for Proof. If I was of Opinion, that Laws *had* such a Power as this, I should not dispute whether they could annul Marriages: And the Author seems to be enough sensible, that *without* this Support all that he can say else must end in Nothing: Of which he has given very strong Proof. For let us follow him a few Steps in his own way of Reasoning.

The Question is, whether a Marriage Contract, made by Persons to whom the Law has forbidden the Use of Marriage, is *void*; and he answers, *Yes*; for the same Reason that a Contract made by a Minor to pay a Sum of Money after he comes of Age is void in Law. There is something here that wants a little clearing. A Contract made by a Minor to pay a Sum of Money, &c. he says is void IN LAW: Therefore a Marriage Contract
made

made by a Minor is void——How *void*? Are we to say IN LAW? So it *should* be to give the Sentence its right turn: And yet it is plain his Meaning is, that it is void IN CONSCIENCE too: for he immediately sub-joins——*If a Minor executes a Bond he is no Knave though he does not pay the Money. His CONSCIENCE in this Case will not bind him.* And he tells us, (p. 16.) that the Marriage of a Minor without his Parent's Consent is *void* IN CONSCIENCE *as well as in Law.* But what is his Reason, why, if a Minor contracts to pay a Sum of Money after he comes of Age, his Conscience will not bind him to pay it? Why, *because in general he really is, as the Law always supposes him to be, an INCOMPETENT JUDGE of the Conditions.* With great Submission this is no true Account of the Matter. Suppose a Minor should execute one Bond the Day before he comes of Age, and another the Day after; would you say that he was a competent Judge when he executed the second Bond, and an incompetent one when he executed the first? I guess not: And yet the second Bond would hold him, the first not. Therefore, the true Reason why a Contract made by a Minor does

not bind, cannot arise from the *actual Incapacity* of the Person that makes it at the time of making it ; (for this Reason will not reach to *all* Cases, and perhaps but to a *few*) but it arises from hence ; That during his Minority he is under SUCH TERMS with the SOCIETY, that, howsoever qualified he may be as to his *natural Capacity* to make the Contract, he has NO RIGHT to make it : And all Contracts made by Persons who have no Right to contract are *ipso facto* Null.

It will be necessary then to consider upon *what Terms* every Minor stands with Society, and *how far* they extend. And this I shall take from the Author himself ; who says, that *Law neither does nor can divest the Minor of the RIGHT to his Estate ; but it may and does settle the Time when he shall come to the ENJOYMENT of his Estate* ^a. Agreed : And therefore a Contract made by a Minor as to the *Enjoyment* of the Estate *in præsent*i is null ; for *that* Right is vested in the Society : But, as it is admitted that the Minor's *Right to the Estate* still subsists, I see no Reason why a Contract *de futuro*, or when the *Impediment*

^a Page 5.

shall be removed, will not bind, (I mean *in Conscience*) provided the Minor has Capacity enough to *understand the Business he is about*^b, and the Contract be made *bonâ fide* without Fraud or Covin. If it be asked, of what *Use* then are such Laws? I answer, to *prevent* such Contracts: And they do it effectually: For who ventures his Money when the Law will give him no Security?

If the Reader will consult the Dissertation, he will see what Authorities I have for this Opinion. But perhaps there may be something in this Matter as to *Estates*, that it may be fitter for Lawyers to consider than for me. Nor is it at all material for me to pursue it; as it is not a *principal* Point in the Debate, but was brought in only as an *Example*, to shew that, notwithstanding his Minority, a Person may be qualified to lay

Si Pactum, aut Promissum juratum, nullo alio laboret Vitio, non potest eo nomine rescindi quod a Minore sit initum, modo in præsens *Negotium intelligere potuerit*. Puffendorf. de Jur. Nat. lib. iv. cap. 2. § 11. *The Oath alters not the Case either one Way or the other. For the Oath only enforces a Contract valid in itself; it will not make a Contract valid which is in itself invalid, as Puffendorf himself observes.*

himself under Moral Obligation; which (whether this Example be pertinent or not) is a *certain Truth*; and the Author (how unwilling soever he may be) *must* own it to be so. For otherwise he must annul all the Marriages of Minors, whether made *with* the Consent of Parents or *without*; because, unless the Minor has a natural Capacity to make the Contract, the Parent's Consent can operate nothing. It remains then only to see, whether Minors are under the *same Terms* with Society, in respect to the Use of the Marriage-bed, as they are in respect to the Enjoyment of their Estates: That is, whether the one as well as the other is vested in the Society for the Minor's Benefit. If this is *not* so, the two Cases will stand upon different Foundations; and the Author's Argument must fail him. If the Reader will consult the *Enquiry*, &c. He will see my Reasoning to shew, that a Person's Right to the Use of the Marriage-bed neither is, nor can be vested in the State. My present Business is, to see whether the Author has given a sufficient Answer to it: Which will appear by what you will find under the following Observations.

OBSERVATION III.

The Question concerning the Consent of Parents, which some insist upon as necessary by the natural Law to the Validity of a Marriage Contract, — though largely discussed by our Author, is, I think, remote from his Purpose. The Enquiry is concerning the Power of STATES: — No matter whether such Power be founded in Nature; it is sufficient, if it be not contradictory to the Law of Nature, p. 12. 13.

REMARKS.

This Passage surprizes me extremely! I persuade myself that we are agreed in our general Principles of Policy, that is, that we are both for the POPULAR SYSTEM, as laid down by *Puffendorf, Locke, and Others*. And yet (unawares) the Author is sliding back into the Politics of a hundred or two Years ago. It is true, the Question is concerning the Power of *States*: But how will you be able to *settle* the Power of States without going back to the natural Law? If the
Power

Power of States flowed from an *inherent, underived* Right within themselves, there would have been no Occasion to have gone to the natural Law. But if Society *breaks out* from the natural State, and has no more Power than what every Man yielded up to it by *Consent* or *Compact*; it will be impossible to settle the Power of States without shewing *what are* natural Rights, and *how*, and *how far*, such Rights were, by the original Compact, *transferred* from Individuals and vested in the Body politick: beyond which if the Laws of Society go, they are *contradictory* to the natural Law. By the Author's Leave therefore, the shewing the natural Right of Parents and Children, with respect to Marriage, was not at all *remote* from my Purpose; but *absolutely necessary* to bring the Point to its proper Issue: And perhaps so he would have judged it himself, if he had had any Thing material to except to that Part of the Argument.

* The Author of the *Remarks* challenges an INHERENT Right to *civil Society*, pag. 5. This would have been looked upon as *political Heresy* thirty Years ago.

But

But should not the Author, when he had set aside all this as impertinent, have offered some *Reasons* of his own, to shew that States have the Power he contends for, and how they came by it? No doubt he *should*, if he meant to write to the Conviction of his Readers: But, instead of this, he shelters himself under *Authority*; as you will see immediately: For thus he goes on.

OBSERVATION IV.

Concerning the Power of States to oblige Children to wait their Parent's Consent in Marriage, PUFFENDORF is very express: For having mentioned several Restraints which civil Laws may lay upon Marriage, he adds; Quarum Legum ea Vis esse potest, ut, quod contra easdem contrahitur Connubium, certis Effectibus, per Jus civile assignatis, destituatur; vel etiam omnino pro invalido, et quod Rescissionem admittat, declaretur. Wherefore our Author should restrain the Adverb omnino, which he construes absolutely, to civil Estimation only; or wherefore he should construe the Word civiliter, in another Passage, in civil Esti-

Estimation, and not by the civil Authority,
I cannot comprehend.

REMARKS.

But every Reader will comprehend it, who takes both Passages together. The first (which the Author has suppressed) is this ; *Certum est, quemadmodum Leges civiles efficere possunt, ut invalide ineantur Contractus quidam, vel quia solennibus quibusdam destituntur, vel quia certis Personis eosdem inire interdicitur ; ita posse easdem Validitatem Matrimonii, inter filios-familias initi, a Patrum consensu suspendere, ut, illo non accedente, Matrimonium CIVILITER pro nullo habeatur, ac rescindi queat.* Here the Author asks, why I have translated the Word *civiliter* by *in civil Estimation*, and not by *the civil Authority*? meaning to insinuate *Puffendorf's* Sense to be, that if a Minor marries without the Consent of his Parents, such Marriage may, by the Authority of the State, be made absolutely or in all respects null. But if *Puffendorff* had meant to say this, he would have expressed himself in other Terms. *Civiliter* never signifies by the civil Authority; but civilly,

villy, or in some civil respect. It is a Term of *Distinction*; and will not properly stand where the Sense is *absolute*. Therefore, if *Puffendorf* had only said that such a Marriage is *civilly* null, it could not have meant that it was *absolutely* or in all *Respects* null; for what is absolute admits of no *Distinction*. But he says a great deal more. His Words are, *civiliter* PRO nullo HABEATUR; which signifies (not that it is Nothing, but) that civilly, or in a civil Respect, it shall be *reckoned*, *esteemed*, or *accounted* as Nothing. And what is this more or less, than saying (as I have said) that such Marriage shall in civil *Estimation* be null?

In the next Passage (which the Author hath set down) the Words *civiles Effectus*, are substituted in the room of *civiliter*; which shews plainly, that by both Expressions he meant one and the same Thing. But here the Author asks another Question: Why I restrain the Word *omnino* to civil Estimation only? I answer, because the Passage requires such Restriction; the Word OMNINO standing in contradistinction to the CERTI *Effectus per Jus civile assignati*, mentioned just before:

and it is the same thing as if he had said, *CERTIS Effectibus per Jus civile &c. vel etiam OMNIBUS, i. e. civilibus Effectibus.* For if you would extend the Word *omnino* so as to take in the Obligation as it lies in *Conscience*, neither will the Expression be just, neither will this Passage agree with the other, where the Nullity is expressly limited to civil Effects only^d.

The Author then begins his Triumphs a little too soon, when he asks, in a sort of Admiration, *How unwarily does he [the Dissertation] observe upon these Passages, that the Limitation of the Nullity, which Laws may declare against Marriages in certain Cases to civil Effects only, carries with it a Confession, that no Act of Law can destroy the Vinculum Matrimonii as it lies in Conscience: and on no better Grounds assumes this Petitio Principii, that the Consideration of a Parent's being under Society gives him, in this respect, no more Right over his Child than he had, or*

^d If you can want farther Conviction, compare these Passages with another Passage cited from the same Author under the seventh and last *Observation*, and you will find it.

would have had, out of Society. p. 14. Under Favour, if *Puffendorf* has limited the Nullity to civil Effects, it ought to be taken as a Confession, that it does *not* extend to the *Vinculum Matrimonii* as it lies in Conscience; and that he *has* so limited it his Words shew. But (proceeds the Author) *I will point out a Reason, in Puffendorf's own Words, why he lays it down so positively, that the Law may annul the Marriage of a Child as to all civil Effects* [he should have added, *and in Conscience too*] *merely because the Parent's Consent is wanting; and it is this, " Facultas*
" moralis ad præstandum quid nos obligandi
" deest circa Res et Actiones alienas; quippe
" quæ non nostro sed alterius Arbitrio sunt
" subjectæ." I was so little afraid of this Passage, that I put it into the Author's Hand myself; as the Reader will see, *Dissert.* p. 28. And what did I produce it for? Why to shew, that *Puffendorf* having (virtually) granted, that a Marriage Contract made by a Minor, though without the Consent of his Parents, is good in *Conscience*; he must of Necessity be understood as admitting also, that Society gives a Parent no more right over his Child in this respect, than he would have out of
So-

Society: because if it *did*, and the Child by an Act of Society was put absolutely under the Parent's Will, the Marriage of such a Child without his Consent would be void in *Conscience* as well as in Law: for upon this foot the Contract would be *circa Rem alienam*, and therefore, by his own *general Doctrine*, *void*. What now does the Author? Why he lays hold of this general Doctrine, and *applies* it to the Case of a Minor's marrying without his Parent's Consent. By what Authority? Does *Puffendorf* say, that the Marriage of a Minor without his Parent's Consent is a Contract *circa Rem alienam*? He says no such Thing. If the Author can *prove* it so to be, it is very well; and when he has done it, he shall be allowed the full Benefit of *Puffendorf's* general Doctrine: But if this is not proved, the *Petitio Principii*, which he complains of, will lye with Himself and not with Me.

And thus much for the Sense of *Puffendorf*: As to which the very utmost that can be said, is, that he has determined *Nothing* about the *Vinculum Matrimonii*, as it lies in Conscience, but left it *in medio*. I do not think

think this reasonable to be said; because the *Jus Naturæ*, (which is the Law of *Conscience*) is his principal Subject. But if the Author shall think fit to make Use of this Plea, he is welcome to it; and the Case will then be, that *Puffendorf* will help Neither of us; but we must go to the Merits of the Question as it stands upon the Foot of *Reason*. His Position is, That *the Minor is by the civil Authority put under the Will of the Parent*, in respect of Marriage. p. 21. But has he said any thing to shew how the State *came* by such Power? Nothing *directly*. All he has done is, to *except* against those Reasons by which I have endeavoured to prove the contrary: Which Exceptions shall be admitted as Evidence, if he can make them good. Let us see how this Matter stands.

That no State can give what it *has not* to give, is self-evident. That no State *has* any Thing *to give*, but what it has by *Consent* or *Compact*, the Author admits: for he says, That *the Liberty of Man in Society is under NO OTHER Power but that established BY CONSENT*. It is farther evident, That the Power now contended for, and which, the

Author says, the Father *receives from* the State, cannot come to the State *from* the Father: It remains then, that, if the State has any such Power, it must come from the Son. Now This is what I have said, *viz.* That the Son *cannot* yield the Power which he naturally has over his own Person into the Hands of the State; because such Resignation would amount to a Renunciation of the Means appointed of God for the Preservation of Chastity, as in the Case of Vows of Celibacy. To this the Author has replied.

OBSERVATION V.

Not EVERY Renunciation of the Means appointed by God for the Preservation of Chastity, or every Vow of Celibacy—but a FULL and ABSOLUTE Renunciation, or a Vow of PERPETUAL Celibacy [is what] every Protestant must allow to be unlawful.
p. 8.

REMARKS.

Will the Author be pleased to *abate* Nothing of this? Suppose a Man should vow
Celibacy

Celibacy till he is *Threescore* Years of Age.—
That may be more than equal to a Vow for
 Life. May he then vow Celibacy till he is
Fifty-nine Years of Age?—A Year (you will
 say) makes no Difference:

*Utor permissò, Caudæque Pilos ut equinæ
 Paulatim vello.*

May a Man vow Celibacy till he is *Fifty*—
 or till he is *Forty*—or *Thirty*—or *Twenty-*
five?

Excludat Jurgia Finis.

Say where you mean to stop, and I am content—But *Laws* must fix the Time: As they do the Time when a Person shall come to the Use of his Estate. I answer: *Laws cannot* fix the Time when it may be fit that Persons should *marry*; though They *may* fix the Time when it is fit They should be *entrusted* with their Estates. The Reason is, That let *Laws* fix the Period of Minority with respect to Estates as they please, Nobody is *hurt* in this Case: There is no Law of God that can *interfere*, whether a Man is held in Minority till he is One and Twenty, or Five and Twenty, or Thirty, or any other Period

which is found in Use not to be inconvenient. But will any one pretend to say, that a Man may not be bound to take a *Wife* before he is Five and Twenty, or Thirty? If he should, he would find it very hard to make his Assertion good. But the Author, we are sure, is none of Those; for he does not seem willing that the Use of Marriage should be suspended for more than *a Year, or two, or three*: Which is very moderate, I confess; and *looks* as if he thought, that suspending it for a longer Time might be attended with some Danger. I find the Author of the *Remarks* to be of the same Opinion. *He* talks of *a Year or two*^f; and he seems *offended* with the *French Nation*, that They will not allow *Sons to marry without Consent till Thirty Years of Age, or Daughters till Twenty-five*. Yet he thinks that Twenty-one may well be admitted as a proper Standard; that is, Because our Laws have fixed the Period of Minority at One and Twenty: which he says is *some Comfort, as well as Credit, to all good English Men*^g. No Doubt: and to *bad English Men* too! But

* Page 10. ^f Remarks on the Dissertation, &c. p. 9.

^g Ibid. p. 17.

suppose the late Act had settled this Point just as it is in *France*, would he have told the Legislature (as he has told the *French*) that it was THEIR Business *only to consider it*, and not HIS; or would he have sent over for some *French* Casuist to justify it? Why no; I suppose *not*: and why should he? His Arguments would have been just as good as they are *now*; which rely upon this general Point, *viz.* that States have a *discretionary* Power to settle the Time when Persons shall be permitted to marry without the Consent of their Parents. If the Author can support this Point, he may justify the *French* Laws as well as *ours*; if he cannot, he can *justify Neither*, so as to make Law the Rule of Conscience. For, low as the Age of Minority is settled here, there can be no Doubt but there will be considerable Numbers within that Period, to whom Marriage ought to be permitted; and who yet will be hindered by this Act. For the Truth is; That the Reason enforcing the Use of Marriage has no Relation to the Years of a Person's Life; but to the Strength he has to resist the Temptations to Incontinency, and to keep himself within the Bounds of Virtue and Sobriety: Of which as Every Man is the

only Judge for Himself, and the same Measure will not suit all Persons, it appears, That the Right to the Use of Marriage must commence with the *natural Capacity*; to be exercised as private Discretion shall direct, under the *Advice* and *Assistance* of Parents, (who should *always* be consulted) but under the *absolute Controul* of None.

But the Author thinks I have overshot Myself in this Argument; for he says,

OBSERVATION VI.

This Argument, I apprehend, will carry him farther than he intends: For let us suppose the Parties to a Marriage to be Thirty or Forty Years of Age: In the Case of Unfaithfulness to the Marriage-bed, and in some other Cases that may be put, wherein the Contract voids itself, and the original natural Right of contracting remains entire; what Recourse have they to the proper Remedy against Fornication? They have precluded Themselves as effectually, and laid Themselves under Conditions that are subversive of the Right of contracting, as the Minor is precluded

ed by Law; and can only be relieved by the Intervention of the Law, &c. p. 7.

REMARKS.

I was well aware of these Cases : But cannot see how they operate any thing to destroy or weaken my Argument. For surely there is a great Difference between a Person's precluding *Himself* from the lawful Remedy by a *voluntary* Act of *his own* (which is the Case, when a Person yields up his natural Right of contracting Marriage into the Hands of Society) and his being *precluded* by the Act of *Another*, in consequence of an Alliance at first honestly and legally entered into. In the Case of Unfaithfulness to the Marriage-bed, the innocent Party lies under great Hardships : But what is it that precludes him from the lawful Remedy ? Why, the civil Laws of some Nations ; for it was not so under the Jewish Law, which punished Adultery with Death. The Author takes it for granted here, that our Laws are right : But, perhaps, I might more reasonably bring my Principle as an Objection to these Laws,

than *He* brings these Laws as an Objection to my Principle. As to any *natural* Impediments, which may shut out the Use of the lawful Remedy in a married State, when yet the Law of God forbids another Marriage; These must be considered as Acts of *Providence*: Who best knows what to do in such Cases. When God lays Burdens upon us, He will give us Strength to bear them, if we behave as we ought; which we have no Reason to expect He should, if we lay them upon Ourselves. In fine; if these Cases are too frequent already, there is little Reason why they should be multiplied. It is pretended, that restraining Laws upon Minors will be a Means to prevent Separations: But, if a fair Calculation was made from past Experience, I believe it would be found, that more Separations have been caused by *Smithfield-Bargains*, than by *Clandestine Marriages*: And the Number of such *Bargains* is not likely to be *lessened* by this Act.

What has been replied to the foregoing *Observations*, I hope, may serve to confirm my general Position, *viz.* That the Right to contract

contract Marriage is naturally unalienable ^h, and consequently not transferable to the State. And let me add this short Remark: That, if it *were* transferable, it would be as well transferable from the Son to the Father *directly*, as by the Intervention of the State: Upon which Foot it might as strongly be pleaded, that Every Father has *naturally* a Right to rescind the Marriage of his Son, made without his Consent, as that he has the same Right by Authority from the State: For the State pretends not to this Right otherwise than for the

^h Dr. Tunstall says expressly, that *the Right of Marriage is an unalienable Right*; (Letter, p. 50.) and (at p. 55, 56.) admits, that where the Use of the Marriage-bed is NECESSARY, *the Parties in a Contract of Marriage publickly PROHIBITED and disallowed, MAY be justified in accounting themselves MAN and WIFE before God.* To the same Effect the Author of the *Remarks* asks: *Has [the Law] any where declared that—the MOST IRREGULAR Marriages of Minors, if ABSOLUTELY NECESSARY, [for the preservation of Chastity, as I understand] are NOT obligatory IN FORO CONSCIENTIÆ?* Two Things then we have granted to us by the Gentlemen on the other Side. 1. That Minors may be bound by the Law of God to marry, notwithstanding any Law of Man to the contrary. 2. That when they are so bound, their Marriages, though against the Ap-

Child's

Child's Benefit; for which the Father cannot be supposed *less* sollicitous than the State is: And yet (as we have seen) all Authors agree, that the Parent has *not* any such *natural* Authority. Therefore, from the Whole, I will take Leave to lay down the following

COROLLARY.

A Marriage Contract made by a MINOR without the Parent's Consent, notwithstanding a Law of the State ANNULLING such Marriage, BINDS IN CONSCIENCE.

pointment of Law, will be good and valid in the Sight of God. But why will these Gentlemen write *against* me, whilst they *give up* the very Points which govern the whole Question? As to what Dr. Tunstal tells us, *viz.* that *the Law* is to judge of this *Necessity*: It is altogether unworthy of Him. Nobody *can* judge of this *Necessity*, but the Person Himself: and therefore, I say, he must *reserve* the Right in his own Hands, to be used or not used as Circumstances shall direct; and *cannot* give it up into the Hands of Another.—But the Reason given by the Doctor, why Persons thus marrying against Law, to preserve their Chastity, are *Man and Wife before God*, should not be passed without Notice. It is because *there is, in this respect, a temporary CESSATION of their LEGAL RELATION to Society.* I do not quite understand this—and it may be as well, perhaps, that Nobody should.

For,

For, the Right to make the Contract not being transferred to the Society, but resting still in the Minor, (who is supposed to be of sufficient natural Capacity) the Law cannot take away its binding Force. What may be understood to be a sufficient natural Capacity, has been declared before: It is a Capacity to understand the Business in Hand: Such a Capacity (nor more nor less) as will qualify a Person to make any other Contract. The Author says (p. 11.) that *the Age Persons are of sufficient DISCRETION* (not merely of MORAL CAPACITY) *is the Age when they are fit to be joyned in Marriage*; meaning (I suppose) by the *Age of Discretion*, the Time when they are able to make a *prudent Bargain*ⁱ for Themselves. I dispute not the Point, as to what might most be *wished*: But I am only considering what is *sufficient* to make the Contract *binding upon Conscience*: which, I say, is and must be the *Moral Capacity*:

ⁱ The Author of the *Remarks* seems to be of Opinion, p. 17. that *quick Parts, and a lively Genius*, may be looked upon as Symptoms that the fit Age for Liberty in Marriage is come: which will be good News for our *sprightly* English Ladies, if they can persuade their *grave* Fathers, or Guardians, to be of the same Mind.

and

and *He* must say so too ; unless he will say, that if a Person makes a foolish Bargain, it is therefore *Null*.—But the Author goes on :

OBSERVATION VII.

I am not of our Author's Opinion, (p. 21. Enquiry) that a Marriage Contract is so entirely of a RELIGIOUS Nature, that it cannot be discharged by the Civil Authority : Nor is it a mere civil Contract. It is of a mixed Nature ; neither merely religious, nor merely civil. The Institution is religious ; but the Contract, so far as Society is concerned in it, is civil, and may therefore be dissolved by the civil Authority. How far God is concerned in it, the Circumstances of every particular Marriage must determine. What, shall we subscribe to our Author's Casuistry ? That there is no such Thing as a Contract in which God is not concerned ; and “ Though all the Laws “ in the World should reclaim, you cannot “ break it without offending Him.” Concerned he is as a Judge to punish the Maker ; but shall we say God is a Party to a fraudulent iniquitous Contract ? A Marriage Contract, considered merely in a religious View, as a solemn

solemn Vow or Oath before God, between the Man and the Woman, in which Society has no Concern, cannot indeed be dissolved.—But, if Society be taken into the Account, there arises a new Obligation; and the Contract is null, ipso facto, if it does not coincide with the Interests of the Society, that is, if it be not conformable to the Laws and Regulations of the State, which are enacted for its Safety and Conveniency. For, as an Obligation cannot be relaxed by one Party to the Disadvantage of other Parties concerned, no more can it have any Force or Operation without the Concurrence of the Interests of them all,
p. 17—20.

REMARKS,

I thought it proper to recite this Passage at large, that the Reader may be assured that I have not disguised it. I persuade myself, that He will find it very hard to be understood; as indeed I do. Thus much only is plain: That the Meaning of it is to shew, that a Marriage Contract, annulled by the civil Authority, is void *in Conscience*, as well as in Law: contrary to what has been laid down
in

in the foregoing Corollary. In this Light I shall consider it.

In the first Place, He insinuates as if I had placed the Stress of my Argument upon This, that Marriage is a *religious* Contract: Which is not true. So far from it, that I have considered it as a religious Contract, no otherwise than as attended with *religious Ceremonies*. But I say expressly, That the Argument has *no Dependence upon this Circumstance*; but that the Contract would have the *same Force* as to *Conscience*, if, stript of *all* religious Rites, it were *made in a common Parlour*; and that, if then made by those who have a *Right* to make it, no Law can dissolve it^k. The Author then is at Liberty to call Marriage a Civil Contract *purely* so, if he pleases: But what will he get by it? There is Religion even in *Civil* Contracts: for God (as I have said) *is concerned in all*. This is the frightful Casuistry, which the Author will not subscribe to—But he *has* subscribed to it: for he says—*Concerned he [God] is as A JUDGE to punish the Maker*; but shall we say, *God is A*

^k See Enquiry, p. 21, 22.

PARTY to a fraudulent or iniquitous Contract?

Who ever thought of God's being a *Party* to a civil Contract? I speak of him as a *Judge*, and so does *He*: I, as a Judge to punish the *Breaker*, supposing the Contract lawfully made; *He*, as a Judge to punish the *Maker*, supposing it made unlawfully: which both come to the same Reckoning. And every Contract is *affirmed* to be *lawfully made*, when it is said, that a Person has a *Right* to make it.

Can a Contract then lawfully made (call it civil or not civil) be dissolved by Law? I say it cannot. The Law may in many Cases take away the Right to contract, and then the Contract is void of itself; but the Right *subsisting*, notwithstanding any Operations of the Law *ab extra*, Conscience will bind; and the Judge of Conscience will punish the Violation. How stands the Case then in respect of the Matter now before Us? I have brought Proofs (not yet answered) that the Law cannot take away *the Right* to make the Marriage Contract: Therefore such Contract, when made, is binding: Therefore the Author's Conclusion, that a Marriage

4

Contract

Contract, if it be not conformed to the Regulations of the State, is NULL, falls to the Ground: And his Insinuations, that such Marriages are *fraudulent or iniquitous* Contracts, are a *Petitio Principii*, and Nothing better.

That which hath misled the Author, and many Others with him, is the Notion, That Marriage is a Thing of a *mixed* Nature, partly *civil* and partly *religious*: Which is not true, unless rightly understood. Marriage, *as such*, or, in its *general* Notion, has Nothing *mixed* in it. It is simply and solely the *Mutual Consent* of the Parties: which is *in its own Nature* binding upon Conscience. The Intervention of Society neither adds to this Obligation, nor can diminish from it; but directs the *Form* and *Manner* of making the Contract, so as to draw it under civil Cognisance. With a View to this Distinction, Marriage, as it subsists *in Society*, may be called a *mixed* Thing, partly civil and partly Religious: *Religious*, with respect to the *Contract*, as binding in Conscience; and *Civil*, with respect to the *outward Forms*, by which the Marriage lays Claim to civil

I

Protection.

Protection. But these two Things must always be kept separate in our Ideas, and each Effect referred to its proper Principle: the Neglect of which has created great Confusion in treating upon this Subject; whilst the Obligation in Conscience is *transferred* from the *Contract*, to which it properly belongs, to the Use of the *publick Forms*, with which it has nothing to do. This is the same Thing as if you should transfer the Claim of *civil Privileges*, from the publick Forms to the *simple Contract*; which, every one will agree, is a great Absurdity.

That *Puffendorf* considered the Matter in this Light is very plain from a Passage in his Sixth Book *de Jur. Nat.* the last Paragraph of the first Chapter; which, for the Reader's Ease, I shall set down at large¹. “ In the
 “ last Place let me observe: That as the publick
 “ Laws of Commonwealths are wont
 “ to invest other Contracts with certain
 “ Rites and Solemnities, upon want of which

¹ Denique & Hoc observandum: uti Leges civiles alios quoque Contractus certis solennibus ac ritibus vestire solent, qui ubi abfuerint, iidem in foro civili pro inva-

“ they pass for invalid in civil Cognisance; so in
 “ some States there are such Ceremonies an-
 “ nexed to Marriage, as, if omitted, will make
 “ it [*absolutely*] illegal; or at least deprive it
 “ of *some* Effects, which would otherwise
 “ have resulted from it according to the
 “ local Customs and Constitutions of such
 “ Countries. Now although the Law of
 “ Nature be a Stranger to these Formalities;
 “ yet, inasmuch as the natural Law com-
 “ mands all Subjects to obey the Laws of
 “ the Society, under which they live, it
 “ would be to no Purpose for such Persons
 “ as have not the Power of making or of
 “ reversing civil Laws, to plead the *Indif-*
 “ *ference* of the natural Law in this Mat-
 “ ter;” that is, to pretend to excuse them-
 selves in the Neglect or Contempt of the

lidis censentur; ita et *Matrimonio* talia quædam, in
 Civitatibus nonnullis, deprehendi adjuncta, ut, si illa
 abfuerint, *pro legitimo* idem non habeatur, aut saltem
quibusdam Effectibus, in foro civili, careat. ILLA
 SOLENNIA etsi a Jure naturali ignorentur; tamen
 cum IDEM Jus leges civiles observari jubeat ab illis
 qui iisdem subjiciuntur, INDIFFERENTIAM juris na-
 turalis heic *nequidquam* allegant qui potestatem se-
 rendi aut abrogandi leges civiles non habent. *De Jur.*
Natur. Lib. vi. Cap. i. § ult.

legal

Legal Forms, by saying, that the Law of Nature does not require the Use of them. Where, you see, that the Author gives only a *civil* Effect to the Use of these Forms, and resolves the Obligation of the Subject to comply with them, not into any Defect that the omitting them will occasion as to the Validity of the Contract *in foro Conscientiæ*, but, into that *general* Obligation which all Subjects lie under to observe the Laws of their Country. He that contracts Marriage privately is *bound* by the Law of Marriage: but he is not entitled to *Cohabitation*; which (till he has complied with the public Forms) will be *vicious* even under the *Seal* of Marriage.

CONCLUSION.

I HAVE carried this Review through the whole *Enquiry*, and that Part of the *Dissertation*, where I establish the Right of Minors to contract Marriage, and the Power of binding themselves in *foro Conscientiæ*. Am I singular in this Opinion? By no Means. I may plead the Sense of all our old Laws, as well since as before the Reformation: which, against the whole Weight of the Roman

Laws, and notwithstanding what might be alledged from Scripture Examples, or the^m Law of *Moses*, constantly admitted the Marriages of Minors, though without the Consent of Parents, as good and valid in Conscience. Upon what *other* Principle, I

^m The Author of the Remarks triumphs much upon this Part of the Argument. I shall not dispute the Point over again; but leave it to the *Judicious* to consider; who well know, that I am not singular in interpreting the Law in *Numb. xxx.* as relating only to *religious Vows*. Commentators are unanimous in this Point. (See *Pool's Synopsis*, and *Bp. Patrick*.) And if, instead of *Vow*, the Word had been *Contract*, or *Promise* at large, it would not have served the Author's Purpose, since even *then* the Law could not have extended farther than to those Points with respect to which the Parties were *sub Imperio*, which is not the Case of Children arrived to Ripeness of Understanding, with respect to Marriage, as both *Grotius* and *Puffendorf* expressly teach. As to the Case in *Exod. xxii.* which he boasts of as *in Point*; it is manifestly *short* of the Point. That Law says, that if a Man debauched a *Virgin that was not betrothed*, and her Father would not consent that he should marry her; the Corruptor should pay her a Sum of Money. *Quid ad Rem?* No body doubts but that the Father had absolute Right either to give his Consent, or to refuse it. But the Question is, How would the *Want* of the Father's Consent have affected the *Validity* of the
ask,

ask, could This be, (for we have long got rid of the Popish Nonsense, that Marriage is a *Sacrament*) unless it were This; That though

Contract, supposing that they had married *without* it? To which the Law says nothing. However this be, I am not *specially* concerned in it. All our old Laws are concerned in it as much as I. For surely the Law of *Moses* had as much Force 200 Years ago as it has now! But the worst Part of the Story is, that the Author himself is as much concerned in it as any body: For, if in virtue of the Law of *Moses* every Father has an *absolute Negative* over the Child, as He pretends, it can never consist with his allowing (as He has) that, the Necessity of the Use of Marriage supposed, the most irregular Marriage shall bind the Conscience; nor with his limiting the Operations of the present Act to *Civil* Effects only; as you will presently see he does. For Nothing hinders the Law from binding in Conscience, but a supposed Right in the Minor: for which there can be no Pretence, if such Right is *antecedently* taken away by the Law of *Moses*.

Perhaps I cannot too often repeat it, that I am no Encourager of Children, to make light of their Parent's Advice when they think of disposing of themselves in Marriage; which is an Offence of the first Magnitude. It is the *Jus*, or *Dominion*, which gives *Force* to the Contract that I am considering; and perhaps it may be (as it ought to be) a Caution to young Persons to behave properly in this Respect, to let them know, that if they do *not*, they have just Power enough left to *bind* themselves, to *Misery*.

Children are in Duty bound to consult and please their Parents, so far as they are able, yet they have that *Jus*, that *Dominion* over their own Persons, which Laws cannot take away: And that, If they *did* marry without their Parent's Consent, the Marriage was not to be dissolved. *Quod fieri non debet, factum valet*, was then the Doctrine: that is, Children did ill, and contrary to their Duty, in marrying without their Parent's Consent; but the Act *done*, it could not be rescinded. If you say, there was then *no Law* obliging Minors not to marry without their Parent's Consent; I deny it. The *Canons* were against it: The *Rubricks* (which are Statute Law) were against it: So that the Claim of the Parents to an *absolute Negative* had all the AUTHORITY that Law could give it. All that the late Act has done, is only adding a CIVIL PENALTY: As the Author of the *Remarks* hath confessed in a ⁿ Variety of Places: But it is the *Authority* of the Law,

ⁿ Thus the Law is spoken of as a *civil Sanction*, p. 4. —As with-holding all the *civil Consequences* of Marriage, p. 5.—As with-holding only *civil Confirmation*, p. 8, 10. All this is confessing, that the Law does not reach the *Vinculum Matrimonii*, as it lies in Conscience: Nor
not

not the *Penalties* of the Law, that binds the Conscience.

As to the Equity of this Penalty, ° I have Nothing more to say than what I have already said in the *Dissertation*. I there put this Question—" By what Rule of Construction
 " a Presumption will lie, that a Son, who in
 " entering into Society must be understood
 " as having reserved to Himself his natural
 " Right to contract Marriage, CONSENTS,
 " that, in Case he shall find it proper to make
 " Use of this Right, a *Disberison* shall pass
 " against his whole Issue &c." To which the Author of the *Observations*, upon which

do I remember a Place where the Author has formally said that it does ; tho' Dr. *Tunstal* has said it often.

• By this I discharge Myself of a very bulky Part of the Dispute, which is, The great *Inconveniences* of Minors marrying without the Consent of their Parents : in which all Writers to a Man constantly forget that there are any *Inconveniencies* on the other Side ; a Conduct which, one may be very certain, Baron Puffendorf's *grown Man* in *swadling Clothes* would not have been guilty of. I have taken the Liberty to hint at a *few*, both in the *Enquiry* and in the *Dissertation*. But the pursuing this Point would perhaps be thought *too bold* ; for which, and for *other* Reasons of *Decency*, I forbear it.

Dissert. p. 32.

D 4

I have

I have been commenting, gives this Answer; (p 22.) *If a new born Infant was furnished with the Aid of Reason, and could see that he would probably plunge himself into many Inconveniencies by the Use of his natural Right to contract Marriage, he would willingly* CONSENT, &c. If the Author speaks this from his Heart, *Non est quod multa loquamur:—Venimus ad Summum:* And I must leave the Public to judge between Us. The Author has *prudently* passed over a Case which I put upon this Occasion. *Dissert.* p. 32. “ When a Man has reserved to himself—his “ natural Right to chuse his Religion—may “ his Consent be presumed to a Law which “ will expose him to Banishment—in case “ he should not think it reasonable to comply with the Religion of his Country?” The Author of the *Remarks* (p. 40.) takes it up for him, and says, *This Objection will, it must be owned, be somewhat formidable, whenever it shall be clear, that a Child, before it is in general supposed to be arrived at the Age of Discretion, has an immediate* RIGHT. This is nothing to the Purpose. The *Right* is admitted in both Cases; and the

the Question is concerning the *Assent* to submit to a *Penalty*, in Consequence of the *Use* of that Right.—But in what follows, the Author seems to insinuate, that the Cases are not *alike*. *Religion*, says He, *is an Affair which of all others is the most PERSONAL, the most a Matter of absolute DUTY, the most ABHORRENT of COMPULSION, and the least capable of receiving any real BENEFIT, even from the most wholesome Severities* ^{p.} As if Marriage was not also *personal*, or might not be a Matter of Duty; as if it were not also *abhorrent of Compulsion*; or, as if the Severities of Law were better calculated to cure a Man of his *Love*, than of his Religion! But the Stress of the Example lies not in any of these *Circumstances*,

^p Dr. *Tunstal* is of Opinion, that “ to avail myself
 “ of a Comparison between the Cases of a publick
 “ established Religion, and a publickly established Law
 “ of Marriage, I must shew, that the *exact Payment* of
 “ *Fifty Shillings* a Year is a proper Means to *rectify*
 “ *Error*;—and that *Banishment, Confiscation, &c.* are
 “ necessary for the Support of the national Religion.”
 p. 46, 47.—He might as well have sent me to *square*
 the *Circle*; for my Argument is as much concerned
 with the One as with the Other.

but in this *general* Point, *viz.* How is it to be conceived, that, when a Person reserves to Himself the free Use of any particular Right, He should at the same Time be *consenting*, that, if He *does* use that Right, He shall be (as it were) dismembered from Society, and suffer the Punishment of a Transgressor? Which to *me* is altogether unintelligible. In the Case of Religion it is confessed, that Consent may *not* be presumed: But in the Case of Marriage (in which there may be as much Religion as in going to *Church*, or to a *Meeting*) it is declared, that the Consent *may* be presumed: for no other Reason, that I or any one else can see, than because it suits the Purpose of these Writers to *maintain* it. The Cases are the same; and Both stand upon this common Bottom: *viz.* That whatever is a Reason for *reserving* a Right is as good a Reason for not consenting to be *punished* for the Use of it.

If I might presume to advise these Authors, it should be, not to sweat Themselves in labouring to reconcile Contradictions: but to give up This as an indefensible Point, and say roundly, that, *in this Case*, the State has
no

no Need of the Minor's Consent; but that NECESSITY will justify laying the Penalty. This will set them quite out of the reach of my Argument. For the Reader, no doubt, perceives by this very Question, (and will find more fully in the *Dissertation*) that I am considering the Matter, as it stands upon the Foot of the *common* Principles of a *free Policy*, &c. not entering into those Cases which supersede common Rules. *Publick Necessity*, in SOME CASES, may justify *Stretches* of Power: Nothing else will. But it might deserve Consideration, whether, (putting SELF-DEFENCE out of the Question,) *public Necessity* can be pleaded for denying a *natural Liberty*, the Use of which may be necessary for the maintaining a good Conscience towards God. Leaving This then to the Consideration of LEGISLATORS, and laying it down as a ruling Principle, that no Law of Man can bind the Conscience against the Law of God; nor therefore destroy the Right to contract Marriage, where the Law of God calls to the Use of it; the Resolution of the Case, upon the Whole, I think will stand thus, *viz.* That the Minor,

if

if He transgresses the Law, is bound by his Allegiance to submit to the *Penalty*; but the Contract will hold him in Conscience. HE CANNOT MARRY AGAIN.

To support this Conclusion was my principal View, when I undertook this Subject: in which I am sure I have shewn no Disrespect to the Law. For the Law has not said (nor indeed *could* it say) that the *Nullity* shall reach to *Conscience*; though *some* of its Defenders have. But surely This is a Point, in which Every Body should be well instructed: And I hope the offering my Assistance will not be thought foreign to My Profession, considering how much the publick Virtue may be concerned in it. Yet do I not set up Myself to *dictate*, or to *prescribe* to the Judgment of Others, if any shall see Cause to differ from Me; but only to give my *Opinion* with that Faithfulness and Freedom that becomes Me: leaving Every One (the Argument well weighed and considered) to determine for himself, as his own Reason and Conscience shall direct Him.

I have but one Word more to say, and that is to the Author of the *Observations*:
Who

Who seems offended ^a at my appealing to the FRIENDS OF LIBERTY to consider whether the annulling Clause, as to Minors, will stand with the Principles of Liberty. I had Reason to appeal to the Friends of Liberty; because I had None else to appeal to. None but the Friends of Liberty are within the Reach of my Argument. But if he thinks that by this I mean a Charge upon ANY who *call* themselves the Friends of Liberty, that they are *not* the Friends of Liberty; he does me a manifest Wrong: As Every one must be sensible that my Appeal would have neither Use nor Propriety, but upon the Supposition that (however we may differ upon a particular Point) they are, in the general, persuaded (as I am persuaded,) that the only Way to continue us a happy People, is a *steady Adherence* to those Principles, by which we have been ONCE saved from Destruction. He professes HIMSELF *a warm and zealous Friend of Liberty*; and says, he *would by no means be an Advocate for the Reasonableness and Equity of the Marriage Act, if he thought there was the least Appearance of an Infringement upon*

the Liberty of the good People of England. Of all This I have not the least Doubt : But I cannot consent to what follows. For he goes on, and says, that *the Liberty of a MAN at Years of Discretion, and the Subjection of a Child in his Nonage, are so consistent and so distinguishable, that he does not see how LIBERTY natural or civil, is AT ALL CONCERNED IN THE QUESTION.* It is familiar with these Writers to treat ALL, whom *Laws* declare to be *Minors*, as *mere Babes*, who scarce know their Right Hand from their Left: as if the Ordinances of States could *create* common Sense, and GOD Himself could not give it. But the Author should have remembred, (and the Reader, I hope, will not forget) that the Persons, whom we have been considering under the Appellation of Minors, are those who have arrived to the FULL USE of their UNDERSTANDING; though not furnished (perhaps) with that *Cunning* and *worldly Policy*, which *Some* seem to think necessary to qualify them to chuse Husbands or Wives. Nature has placed them under the Guidance of their Parents, to give them sober Sentiments, and to help their Inexperience in Things; and if THEY will do their Duties, I am persuaded that
they

they will do Every Thing that Providence intends *should* be done. But to say that young Persons have Nothing to do with LIBERTY, is to say that they have NO RIGHTS; and when this Author can *shew* that they have none, I will ask Pardon of Him and the Publick for what I have written.

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